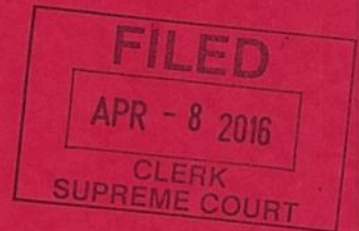


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2015-SC-000224-D
244



KENTUCKY RIVER FOOTHILLS DEVELOPMENT
COUNCIL, INC.

APPELLANT

v. (On Appeal from Court of Appeals 2013-CA-001858)
(On Appeal from Madison Circuit Court 11-CI-00743)

CATHY PHIRMAN, Administratrix of
the Estate of MELISSA STEFFEN,
JOANNE GILLIAM and DARYLL GILLIAM
as Guardians of CONNER KEITH GILLIAM,
and CARTER RAY GILLIAM, unmarried infants

APPELLEES

**BRIEF OF APPELLANT, KENTUCKY RIVER
FOOTHILLS DEVELOPMENT COUNCIL, INC.**

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CERTIFICATE OF SERVICE

It is hereby certified that true and accurate copies of the foregoing were hand-delivered on April 8, 2016, to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601. I hereby further certify that true and correct copies of the foregoing were served upon Douglas L. Hoots and Gregory M. Funfsinn, Landrum & Shouse, LLP, 106 West Vine Street, Suite 800, P.O. Box 951, Lexington, Kentucky 40507-0951; J.T. Gilbert, Coy, Gilbert, Shepherd & Wilson, 212 North Second Street, Richmond, Kentucky 40475; William G. Clouse, Jr., Madison Circuit Court Judge, 101 West Main Street, Richmond, Kentucky 40475; and Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, by U.S. Mail, on this the 8th day of April, 2016. I further certify that the Record on Appeal was not withdrawn by the undersigned counsel.

Counsel for Appellant

INTRODUCTION

Kentucky River Foothills Development Council, Inc. (“Kentucky River”) is the community action agency for Clark, Madison, Estill and Powell Counties, which, among other things, runs a substance abuse treatment program for homeless or marginally homeless women. The Appellee sued Kentucky River alleging its negligence led to Melissa Steffen’s suicide after voluntarily leaving Kentucky River’s substance abuse program, and the issue on appeal is whether Kentucky River is entitled to sovereign immunity pursuant to the analysis set forth in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009).¹

¹ In *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009) the Kentucky Supreme Court identified the immunity of the quasi-governmental agencies before the Court as “sovereign” immunity. *Id.* at 104 (holding “both entities are covered by sovereign immunity and cannot be held liable in tort.”) Subsequent Court of Appeals’ decisions applying *Comair*, however, have described the immunity that applies to such agencies under the *Comair* analysis as “governmental” immunity. *See, e.g., Northern Kentucky Area Planning Com’n v. Cloyd*, 332 S.W.3d 91, 96 (Ky. App. 2010) (holding “Despite the hybrid nature of these entities, analysis of their parent entities and the functions they perform reveals they are entitled to governmental immunity.”) Before the Circuit Court, Kentucky River followed *Comair* by referencing the immunity as “sovereign” immunity. To remove any question regarding the immunity sought, Kentucky River will use the term “sovereign immunity” throughout this document as was used by the Kentucky Supreme Court in *Comair*.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant submits that oral argument would be helpful to the Court. To the Appellant's knowledge, this Court has never directly addressed whether a community action agency is entitled to sovereign immunity pursuant to *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009).² Thus, it is an issue of first impression that merits oral argument.

² While there are no cases directly on point, the Kentucky Supreme Court has tacitly provided guidance on this issue in two cases. First, based upon the Kentucky Supreme Court's holding in *Wilson v. City of Central City*, 372 S.W.3d 863, 869 (Ky. 2012), reh'g denied (Aug. 23, 2012), an entity is covered under the Whistleblower Act only if it would be entitled to immunity under *Comair*. Second, the Kentucky Supreme Court decided a case in May, 2015 in which an employee asserted a Whistleblower Act Claim against another community action agency, Pennyrile Allied Community Services, Inc. ("PACS"). *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 349 (Ky. 2015), *as modified* (Mar. 3, 2015), *reh'g denied* (May 14, 2015). In that case, the Kentucky Supreme Court determined that the employee's question to the local sheriff's office regarding her employer's actions did not constitute a report, disclosure, or divulgence triggering the whistleblower protections of KRS 61.102; and, her confrontation with her supervisor at the PACS staff meeting, expressing her objection to his entry upon her property did not constitute a report, disclosure, or divulgence triggering the whistleblower protections of KRS 61.102. Coverage under the Whistleblower Act does not appear to have been at issue in the Supreme Court's review – or to have been raised at any time by either party. Nevertheless, an implicit presumption underlying any Whistleblower Act claim against a community action agency is that the community action agency is a public agency entitled to immunity under *Comair*.

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STATEMENT OF THE CASE

This is a wrongful death action wherein the Plaintiffs assert that Kentucky River's negligence caused the decedent, Melissa Steffen, to commit suicide sometime after she voluntarily left a Recovery Kentucky substance abuse program that was operated by Kentucky River. [Record, Volume 5, Third Amended Complaint, pp. 842-49.] Kentucky River denies any legal or factual responsibility for Ms. Steffen's death, which occurred after she voluntarily quit the program. Kentucky River also asserts, however, that it is a quasi-governmental agency entitled to absolute sovereign immunity to the Plaintiffs' claims. Kentucky River filed a Motion for Summary Judgment on Sovereign Immunity asserting its immunity on July 22, 2013. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.]

Kentucky River is the community action agency for Clark, Madison, Estill and Powell Counties. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] Kentucky law requires every county in Kentucky to designate a community action agency to combat poverty in its community. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] Each county is required to either designate itself as its own community action agency, or designate a non-profit corporation to become its community action council. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] Where counties do not designate a community action agency, the governor is authorized to designate an agency for them. KRS 273.435(3). Counties can also join together to designate a joint community action agency. When a non-profit corporation is designated as community action council for one or more counties, it becomes a public agency governed by the Interlocal Cooperation Act and a special district pursuant to KRS 65.060. The

designated community action agency is statutorily mandated to provide county services for the poor.

Kentucky River was first designated as the community action agency for Clark County in 1968. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] It has since become the community action agency for Clark County, Estill County, Madison County, and Powell County. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] As the community action agency for these counties, Kentucky River receives these counties' share of the annual federal Community Services Block Grant that is distributed through the Kentucky Cabinet for Health and Family Services. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.]

As the community action agency for Clark County, Estill County, Madison County, and Powell County, Kentucky River operates and provides various programs, services, facilities, and assistance for the poor. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21.] Examples of these programs include: Head Start and Early Head Start programs; emergency food, shelter, and energy assistance programs providing rent, mortgage, and utility credits and assistance; homelessness and housing assistance programs providing housing assistance, transitional housing, rent assistance, substance abuse recovery, housing vouchers, home repair, and subsidized housing; public transportation services in Madison and Clark County; a health care clinic for uninsured and underinsured homeless persons in Estill County and Powell County; and senior citizens centers in Berea, Winchester, Richmond, and Stanton. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512-

21.] Specifically with respect to this case, Kentucky River operates the Liberty Place Recovery Center for Women ("Liberty Place"), which is one of ten Recovery Kentucky substance abuse recovery centers in the state open to homeless or marginally homeless women with substance abuse issues. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21. Affidavit of Jozefowicz, attached hereto as **Appendix Tab No. 3.**]

The Motion for Summary Judgment on Sovereign Immunity was set by the Circuit Court for a special hearing to be held August 20, 2013. [Record, Volume 5, Order Setting Hearing, p. 688.] At the August 20th hearing, after listening to the arguments of counsel, the Circuit Court stated that it was going to deny the Motion. [VR: 08/20/13; 10:55:47.] The Circuit Court, stated that Kentucky River satisfied the government function but failed the parentage test set forth in *Comair* :

Judge Clouse: I think you should. I'm going to have you write the opinion, or not the opinion, but my order.

Attorney Hoots: Ok.

Judge Clouse: I do want an order to say I did affirmatively find that it did do, that it had passed the one prong of the test, that was...

Attorney Stilz: Governmental function.

Judge Clouse: ...the governmental function, it passed. I have trouble with the paternity test, that's because... (laughs)

Attorney Stilz: Paternity test...

Judge Clouse: ...the paternity issue of this...

Attorney Hoots: I got it, I think.

Judge: Okay...and the reason being is that Kentucky River Foothills is not controlled by the four counties that were enumerated in this summary, but rather has

other...provides other services much the same as any other non-profit contract organization that is not necessarily covered by sovereign immunity. I don't want it to be overly lengthy and a final appeal.

Hoots: It won't.

[VR: 08/20/13; 10:55:52.]

Somewhat confusingly, the Circuit Court ultimately executed two versions of an Order denying Kentucky River's summary judgment on September 30, 2013.³ [Record, Volume 5, 1:06 Order, pp. 827-828, 1:27 Order, pp. 822-23, both Orders are attached hereto as **Appendix Tab No. 1.**] For purposes of appellate review, the Orders are materially identical, in that each denies the Motion for Summary Judgment on Sovereign Immunity and states the Court's finding that "The Court does not believe the Defendant is an entity that qualifies for sovereign immunity pursuant to the principles outlined in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009)." Kentucky River filed a Notice of Appeal on October 29, 2013, 29 days after entry of the Orders. [Record, Volume 5, Notice of Appeal, pp. 853-54.]

After briefing and oral arguments, the Court of Appeals entered a 2-1 decision affirming on April 17, 2015. [Court of Appeals Opinion Affirming, dated Apr. 17, 2015, attached hereto as **Appendix Tab No. 2.**] The majority held that Kentucky River performed a function integral to state government, but that it could not be entitled to

³ The two orders were competing versions submitted by the parties. The Plaintiffs' counsel sent the Circuit Court a draft order that Kentucky River's counsel did not agree accurately set forth the Circuit Court's findings. Upon receiving a copy of the Plaintiffs' proposed order, Kentucky River's counsel immediately forwarded to the Circuit Court an alternative version of the order containing the correct language. The version sent by Kentucky River's counsel was a draft originally prepared by Plaintiffs' counsel, which Kentucky River's counsel had previously edited and returned to the Plaintiffs for submission to the Circuit Court. Kentucky River's counsel sent it to the Circuit Court with a letter explaining that it was submitted by Kentucky River's counsel because of a dispute with Plaintiffs' counsel regarding the appropriate order. Kentucky River's counsel did not realize at that time that the end of the proposed Order sent by Kentucky River's counsel still contained a statement that it was prepared by Plaintiffs' counsel.

immunity because it was organized as a non-profit corporation prior to its designation as a community action agency. Judge VanMeter dissented, explaining that “corporate organization was no bar” to immunity under *Comair*, and that as a result of Kentucky River’s designation as a county’s community action agency and the substantial county oversight which that designation entails, “no real question exists but that a community action agency is an agency of the counties involved here.” [Court of Appeals Opinion, Appx. 2.]

Kentucky River respectfully submits that Judge VanMeter is correct, that the fact it was originally organized as a non-profit corporation is not a bar to its immunity status, and that its designation as a community action agency and the resulting oversight and control which that designation entails makes it clear that it is a quasi-governmental agency of the counties which designated it that is entitled to immunity if it performs a function integral to state government. Moreover, because its fundamental purpose is integral to the performance of one of the few functions that this Court has recognized as being a state-level concern, Kentucky River submits that it is entitled to sovereign immunity.

Kentucky River moved this Court to take discretionary review of the Court of Appeals split Opinion holding that a Kentucky county’s designated community action agency cannot be a “political subdivision of the state” if it was originally organized as a non-profit corporation, even though that community action agency performs a function integral to state government. The Court of Appeals’ decision impacts not just Kentucky River, which is the designated community action agency for Clark, Madison, Estill and Powell counties, but every other county designated community action agency in the state

that is organized as a non-profit corporation. The decision also alters well established immunity jurisprudence, elevating the original organization of the quasi-governmental entity over its current form and function. Discretionary review was sought in this case to clarify that when a nonprofit is designated as a county's community action agency, that designation changes the fundamental nature of the entity. Moreover, it is the agency's post designation form and function, rather than its original corporate structure that determines its immunity status.

ARGUMENT

I. Standard of Review.

Whether a defendant is protected by immunity is a question of law that is subject to *de novo* review on appeal. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), as corrected (Sept. 26, 2006).

II. Kentucky River is entitled to sovereign immunity.⁴

As this Court is well aware, the seminal case in Kentucky regarding the immunity of governmental and quasi-governmental agencies is *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). In *Comair*, the Court considered whether the Lexington-Fayette Urban County Airport Corporation, a non-profit corporation organized pursuant to KRS Chapter 273, was protected by sovereign immunity. *Id.* at 103. The Court began its analysis by reciting the well-established difference between counties, which enjoy the state's immunity because they "predate the existence of the state and are considered direct political subdivisions of it," and cities, which are considered municipal corporations and "are now liable for negligent acts outside the legislative and judicial realms." *Id.* at 95. The Court also acknowledged, however, that this distinction is not readily clear for quasi-governmental entities that could not be explicitly tied to a city or county, explaining:

⁴ The Plaintiff argued below that Kentucky River waived sovereign immunity by failing to plead it as an affirmative defense. [Record, Volume 4, Plaintiffs' Response to Defendant's Motion for Summary Judgment on Sovereign Immunity, pp.531-39.] Sovereign immunity, however, need not be plead as an affirmative defense and cannot be waived by a failure to plead. *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 14 (Ky. App. 2009) (emphasis added); see also *Wells v. Com., Dept. of Highways*, 384 S.W.2d 308 (Ky. 1964). Thus, Kentucky River will not address that argument further in this brief.

Numerous other entities, however, fall outside this taxonomy of city versus state and county, and it is not immediately clear whether they are agencies of the state, and therefore possibly entitled to immunity, or more akin to municipal corporations, and are therefore liable in tort. These in-between entities have given courts the most trouble in recent years.

Id. For this reason, this Court endeavored to answer the question “what makes one corporate entity municipal and thus not immune, and another a state agency that is immune?” *Id.* at 97.

In answering this question, this Court abandoned strict application of the narrow two-part test previously used in *Kentucky Center for the Arts v. Berns*, 801 S.W.2d 327 (Ky.1990), which the Court described as “an attempt to lay down a simple formula to determine whether the entity in question was an arm of the central state government (rather than a purely local, municipal corporation).” *Comair, Inc.*, 295 S.W.3d at 99. The Court acknowledged that this distinction was an appropriate area of inquiry, but maintained that the more important inquiry was the function of the entity itself and whether that function focused on state or local governmental concerns. *Id.* The Court explained these two areas of inquiry as follows:

Nevertheless, the basic concept behind the two-prongs—whether the entity in question is an agency (or alter ego) of a clearly immune entity (like the state or a county) rather than one for purely local, proprietary functions—is still useful. It is an attempt to determine first whether an entity falls within the limitations on immunity found in *Haney*. Rather than attempting to reduce that idea to a simple test, however, it should instead be treated as a guiding principle, with the focus instead being on the origins of the entity. This inquiry can be as simple as looking at the “parent” of the entity in question, i.e., was it created by the state or a county, or a city? This amounts to recognizing that an entity’s immunity status depends to some extent on the immunity status of the parent entity. *E.g., Autry*, 219

S.W.3d at 719 (noting that an entity “derives its immunity status through” the parent entity).

The more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which that decision explains means a “function integral to state government.” 801 S.W.2d at 332. This determination has been the focus of sovereign immunity analysis from early on. *See Gross v. Kentucky Board of Managers of World's Columbian Exposition*, 105 Ky. 840, 49 S.W. 458, 459 (1899) (relying in part on the fact that the entity “was not created to discharge any governmental function”).

Id. (emphasis added). The Court described the functions integral to state government as: “state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties).” *Id.* And the Court emphasized that the two inquiries, “the sources of the entity in question and the nature of the function it carries out—are tied together to the extent that frequently only an arm of the state can exercise a truly integral governmental function (whereas municipal corporations tend to exercise proprietary functions addressing purely local concerns).” *Id.* at 99 – 100. This Court’s analysis of the immunity applicable to these “in-between entities” has guided every subsequent immunity decision rendered by the lower courts of this Commonwealth in cases involving quasi-governmental agencies. *See, e.g., N. Kentucky Area Planning Comm'n v. Cloyd*, 332 S.W.3d 91, 95–96 (Ky. App. 2010); *Sanitation Dist. No. 1 v. McCord Plaintiffs*, 2013 WL 275602 (Ky. App. Jan. 25, 2013), review denied (Mar. 28, 2013); *Transit Auth. of River City v. Bibelhauser*, 432 S.W.3d 171 (Ky. App. 2013); *Louisville Arena Authority, Inc. v. RAM Engineering & Const., Inc.*, 415 S.W.3d 671, 682 (Ky. App. 2013), reh'g denied (Nov. 6, 2013).

As set forth below, Kentucky River shares many similarities with the Airport Board at issue in *Comair*. Applying the *Comair* analysis to Kentucky River therefore yields the same result – Kentucky River is an immune entity.

A. Kentucky River is entitled to immunity under the *Comair* analysis because it is an agent of, and controlled by, the counties that designated it.

The first (and less important) inquiry in the *Comair* analysis is whether the entity’s “parent” is itself an immune entity. *Id.* at 99. Here, Kentucky River’s parents are Clark County, Estill County, Madison County, and Powell County, the counties that designated it to act as their community action counsel.

To understand Kentucky River’s parentage, it is important to generally understand the legislative framework in which community action agencies are created. Every political subdivision of the Commonwealth is mandated to have a community action agency by KRS 273.405. A county designating a community action agency has two options, it can designate itself as its own community action agency or it can designate an existing non-profit to become a community action agency. KRS 273.435(2). Kentucky River initially became a community action agency when it was designated as such by Clark County in 1968. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512 – 21.] Since then it has become the community action agency for Clark County, Estill County, Madison County, and Powell County. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512 – 21.]

After Kentucky River became a community action agency, it had to conform its operations and governance to the Community Action Agency Act, KRS 273.405 to KRS 273.451. This was a significant change from operating as a nonprofit corporation. For instance, Kentucky River could be designated as a community action agency only if its

“board of directors is established pursuant to KRS 273.437.” KRS 273.435. KRS 273.437, in turn, mandates that the non-profit’s board of directors shall become the governing board, and shall be structured as follows:

(3) Governing boards and community action boards shall be so established and organized that the poor and residents of the area concerned will be able to influence the character of programs affecting their interests and regularly participate in the planning and implementation of those programs. The articles of incorporation shall be deemed to meet these requirements if they provide that:

(a) One-third (1/3) of the members of the administering board shall be public officers, including elected public officials or their representatives, unless the number of public officers reasonably available or willing to serve is less than one-third (1/3) of the membership of the board;

(b) At least one-third (1/3) of the members of the administering board shall be persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area to be served by the agency;

(c) The remaining members of the administering board shall be officials or members of business, industry, labor, religious, welfare, education, or other major groups and shall be interested in the community;

(d) Each member of the board who is to represent a specific geographic area within a community shall reside in the area he represents; and

(e) Total membership of the board is not less than fifteen (15) and not more than fifty-one (51).

KRS 273.437. Pursuant to this statute, Kentucky River is governed by the public officials, elected representatives, and appointed representatives of Clark County, Estill County, Madison County, and Powell County, the four counties that it serves. [Record, Volume 5, Reply in Support of Motion for Summary Judgment on Sovereign Immunity, Exhibit 1 to Reply, p. 791.] The seven public officials serving on the board include the

Judge Executives of these four counties. The eight low-income sector representatives serving on the board were democratically elected from within these four counties, and each was elected to represent the poor in the area in which they reside. The final seven members are the statutorily mandated “officials or members of business, industry, labor, religious, welfare, education, or other major groups,” and were selected and appointed by the 15 public officials and democratically elected members. Thus, Kentucky River is an agency of the counties themselves and not any municipality.

In addition, becoming a community action agency limited the purposes the entity could pursue. A “community action agency” is expressly defined as a corporation organized for the purpose of “alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs.” KRS 273.410(2).

The designation as a community action agency also fundamentally changed the nature of Kentucky River by making it a public agency and subjecting it to significant government regulation and oversight. As a community action agency pursuant to KRS 273.405 to KRS 273.451, Kentucky River is defined as a government district by KRS 65.060, which states: “As used in KRS 65.008, 65.009, 65.065 and 65.070, the term “district” shall mean and the provisions of KRS 65.008, 65.009, 65.065 and 65.070 shall apply to any board, commission, or special district created pursuant to the following statutes: ... KRS 273.405 to 273.453.” Kentucky’s Office of Finance and Administration Cabinet also identifies community action agencies as “Special Districts” in its published

Special Districts Manual. [Office of Finance and Administration's Special Districts Branch, Special Districts Manual, p. 47, attached hereto as **Appendix Tab No. 4.**]

As a government district under KRS 65.060, Kentucky River is required by KRS 65.065 to prepare annual budgets in the same fashion as county budgets, submit those budgets to the Commonwealth's Department for Local Finance, and submit to audit by the Auditor of Public Accounts. Kentucky River is also required by KRS 65.070 to file annual certifications with the County Clerk regarding its service area and statute authority, submit its financial statements to the fiscal court of each county in its service district, and publish its financial statement or otherwise make them available. KRS 65.070 also allows any resident within the district served by Kentucky River to file suit against it to enforce compliance with its statutory obligations.

Moreover, as a community action agency, Kentucky River operates under the direct control and authority of KRS 273.448 and KRS 273.451. KRS 273.448 authorizes the Commonwealth to establish standards by which the "administrative, fiscal and programmatic effectiveness" of Kentucky Rivers' programs shall be measured, to monitor and evaluate Kentucky River's compliance with those standards, to direct Kentucky River to report any information that the Commonwealth deems relevant to Kentucky River's programmatic effectiveness, and to receive and review annual audit reports from Kentucky River. And KRS 273.451 gives the Commonwealth direct control over Kentucky River's funding, authorizing the Commonwealth to reduce, suspend, withdraw, or otherwise retract Kentucky River's funds.

Finally, KRS 273.415 specifically treats community action agencies as public agencies by requiring that "a community action agency shall be organized and shall

operate pursuant to the provisions of KRS 65.210 through KRS 65.300....” KRS 65.210 through 65.300 is the Interlocal Cooperation Act, and applies only to “any political subdivision of this state, any agency of the state government or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state.” KRS 65.230.

As this analysis demonstrates, Kentucky River is a creature of statute created to serve the needs of the counties who designated it as their agency and subject to government control and oversight. Here, like the Airport Board in *Comair*, Kentucky River became the adoptive child of the counties it serves upon its designation as their community action agency, and its parents for purposes of the immunity analysis are Clark County, Estill County, Madison County, and Powell County, which are immune entities.

1. Kentucky River’s immunity status is not determined by its organization or existence prior to becoming a community action agency.

As part of its argument that Kentucky River is not any type of public agency, the Plaintiffs argued below that Kentucky River cannot be a public agency because it existed as an ordinary non-profit before the community action agency statutes were enacted. This argument ignores KRS 273.435(2), which specifically states that a county can designate an existing non-profit corporation as its community action agency as long as that existing non-profit submits to public control in accordance with the statute KRS 273.435. Moreover, it mischaracterizes the issue before this Court, which is not what Kentucky River was in 1968 before it was designated by Clark County, but what it became after that occurrence and what it is today.

It was this initial status argument that persuaded the Court of Appeals to affirm the decision of the Madison Circuit Court below. The essence of the Court of Appeals’

decision was that Kentucky River was originally formed as a nonprofit corporation by private citizens, and that it therefore did not matter that Kentucky River was thereafter designated as a community action agency and now operates on behalf of four separate counties in that capacity. According to the Court of Appeals, “designation as a ‘community action agency’ is a status conferred upon a nonprofit entity, but that designation itself does not alter the fundamental nature of the nonprofit.” [Court of Appeals Opinion, p. 19, App’x, 2.]

Yet Kentucky law mandates that designation as a community action agency changes every aspect of the entity, including its board of directors, its county and state oversight, its essential functions, and its legal status. Prior to being designated as a community action agency, Kentucky River was a nonprofit corporation in control of its own governance, purpose, and functions. As set forth fully above, after designation, it became a creature of the counties that designated it and the Commonwealth that oversees it. Specifically, as a designated community action agency, Kentucky River is subjected to the following statutory requirements:

- KRS 273.410 mandates that Kentucky River be organized for the purpose of “alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs.”
- KRS 273.405 requires Kentucky River to be governed by a board of directors appointed by, and elected from, Clark, Madison, Estill and Powell counties.

- KRS 273.430 limits the powers of Kentucky River to those four powers specifically enumerated therein, which are substantially narrower than the seventeen powers enumerated in KRS 273.171 for private, nonprofit corporations. For example, as a designated community action agency Kentucky River does not have the power to cease operations, to indemnify its directors, to elect its own directors, to operate outside of its designated territory, or to sue or be sued.
- KRS 273.415 mandates that Kentucky River “shall be organized and shall operate subject to the provisions of KRS 65.210 – 65.300,” which is the Interlocal Cooperation Act, and which applies only to “any political subdivision of this state, any agency of the state government or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state.” KRS 65.230.
- KRS 65.060 defines Kentucky River as a “district” of the Commonwealth of Kentucky, and mandates that Kentucky River follow the provisions of KRS 65.008, 65.009, 65.065, and 65.070. KRS 65.065 and KRS 65.070, in particular, require Kentucky River to:
 - Prepare annual budgets and submit them to the Department for Local Finance in the same manner as county governments. KRS 65.065.
 - Perform annual audits and be subject to audits by the State Auditor of Public Accounts. KRS 65.065

- File annual certification with the county clerk regarding its service area and statutory authority. KRS 65.070.
- Submit annual financial statements to the Fiscal Court of each county in its service area and publish or otherwise make those statements available to the public in its service area. KRS 65.070.
- KRS 65.065 and KRS 65.070 both subject Kentucky River to suit by any resident in its district to enforce compliance with its statutory obligations under either statute.

Moreover, the General Assembly limited the powers of a community action agency as compared to a nonprofit corporation. The general powers of a designated community action agency are set forth in KRS 273.430, which limits the powers of the community action agency to the four powers set forth therein and specifically does not grant it all of the powers of a private, nonprofit corporation. While a designated community action agency shares some of the powers of a private nonprofit corporation, such as the right to borrow money and apply for loans and grants, it does not have the power to cease operations, to indemnify its directors, to elect its own directors, to operate outside of its designated territory, or to sue or be sued. *Compare KRS 273.430 with KRS 273.171.*⁵

⁵ KRS 273.439(1) further confirms that being designated as a community action agency alters the fundamental nature of the designated entity, when it states that “[t]he governing board of a private, nonprofit community action agency shall have the same legal powers and responsibilities granted under its state charter as the board of directors of any private, nonprofit corporation incorporated in the Commonwealth of Kentucky.” If designation as a community action agency did not alter the fundamental nature of the entity and it was still just a private, nonprofit corporation after designation, then its board would already have all the powers of a private, nonprofit corporation, and there would be no reason for the General Assembly to pass a separate statute granting it those powers. The only reason that it would be necessary for the General Assembly to include a special provision reserving those powers for the board of a

Designation of an existing nonprofit agency as a community action agency is not business as usual. The foregoing makes it clear that designation as a community action agency changes the fundamental nature of the designated entity from an independently controlled and operated corporation with full nonprofit corporate powers to a publicly controlled and operated quasi-governmental entity with limited powers and a mandatory public function. Designation as a community action agency placed Kentucky River within the direct control of the counties designating it, compelled it to exist for the sole function mandated by statute, required it to submit to state oversight and control, limited its corporate powers, and altered it into a district of the Commonwealth. This fundamentally changed its nature.

The Court of Appeals' decision held that the fact that Kentucky River was organized as a private, nonprofit corporation prior to being designated as a community action agency was dispositive of its immunity status, regardless of its function and the impact of the designation on its purpose, control, and governance. This decision was based upon both the erroneous conclusion discussed above that designation as a community agency does not alter the nature of the entity, and misapplication of Kentucky law by giving the original organization greater significance than its current organization and function. That misapplication reaches far beyond the confines of this case and should be reversed.

In fact, this Court's seminal immunity decision, *Comair*, requires reversal. In that case, the Court extended immunity to a pre-existing private, nonprofit, non-immune

designated community action agency post designation is if its status changed upon designation such that it would not have retained those powers absent a special provision to that effect.

corporation, the Lexington-Fayette Urban County Airport Corporation. *Comair* eliminates any question that a nonprofit corporation can be an immune entity or that the initial manner of organization as an immune entity is a determining factor in the immunity analysis. Moreover, unlike Kentucky River, the nonprofit corporation in *Comair* was not designated by the General Assembly as a “district” of the Commonwealth, was not classified a special category of nonprofit entity with limited powers and substantial government oversight, and was not statutorily subjected to direct government control. On a spectrum from public to private, a designated community action agency like Kentucky River is far closer to the public side than the private, nonprofit Airport Corporation that was found to enjoy immunity in *Comair*.

Notably, the Court of Appeals decision makes no mention of the Airport Corporation in *Comair* when discussing Kentucky River’s immunity status, and thus offers no explanation as to how that entity could be entitled to immunity while Kentucky River is not.⁶ But the Court of Appeals decision also ignores the statutorily mandated

⁶ The Court of Appeals did, however, survey other states’ treatment of community action agencies and noted that they were not immune in some other states, but those states do not follow Kentucky’s immunity analysis. [Court of Appeals Opinion, p. 23, App’x, 2.] In *Hauth v. Southeastern Tidewater Opportunity Project*, 420 F.Supp. 171 (E.D. Va. 1976), the test for sovereign immunity adopted in Virginia requires an immune entity to possess the power of eminent domain and the community action agency in question was an independent contractor. Kentucky River is not an independent contractor and the test set forth in *Comair* does not require that an immune entity possess the power of eminent domain. In *N.Z. v. Lorain Head Start*, 2000 WL 59911 (Ohio App. 2000), the court held that under Ohio law, “private corporations are excluded from the definition of a body corporate and politic” where the case law required a showing that an entity “(1) [] is a body corporate and politic, (2) [] is responsible for a governmental activity, and (3) [] exercises jurisdiction in an area smaller than the entire state.” *Id.* at *2. Of course, the *Comair* test has expressly rejected the assertion that a private corporation in Kentucky cannot be immune under any circumstances. The same is true for *Sanchez v. Montanez*, 645 A.2d 383 (Pa. Cmwlth. 1994). There, under Pennsylvania law, the court held that a private nonprofit corporation can never be a “local agency” because it is not a government unit and has an independent legal existence. *Id.* at 389-90. Finally, in *Edwards v. Oakland Livingston Human Service Agency*, 2006 WL 1044284 (Mich. App. 2006), the court determined that “because the evidence establishes that OLHSA was incorporated by three individual men, and not by one or more local units of government, OLHSA is not a governmental entity and, therefore, is not entitled to governmental immunity.” *Id.* at *2. Of course, once again, that is not the test set forth in *Comair* because the Kentucky Supreme Court in *Comair* articulated the “adoptive parent” theory and found

organization and functions of Kentucky River (and all other designated community action agencies) when it sought to distinguish Kentucky River from other cases where non-profit organizations were granted immunity, or where an originally non-immune entity became immune by virtue of being designated as a state agency.

For example, the Court of Appeals distinguishes Kentucky River from SLF, the nonprofit corporation which this Court determined was entitled to governmental immunity in *Autry v. W. Kentucky Univ.*, 219 S.W.3d 713 (Ky. 2007), as follows:

While Clark County's decision to designate Kentucky River as a community action agency saddled Kentucky River with additional state oversight and the duty to comply with certain state and federal regulations as a condition of receiving federal block grant funds, it did not convert Kentucky River into an entity existing only for the benefit of the state. Kentucky River remained free to and did offer services and programs outside of the scope of its designation as a community action agency receiving federal block grants. *Compare Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 718 (Ky. 2007) ("SLF was formed as a non-profit organization with a specific and limited purpose . . . while SLF is an incorporated entity, it exists *only* to serve WKU, and derives its immunity status through WKU.").

[Court of Appeals Opinion, p. 20, App'x 2.] This attempted distinction fundamentally misinterprets the effect of an entity being designated as a community action agency. By statute, the only lawful purpose of a designated community action agency is "alleviating poverty within a community or area." KRS 273.410. Moreover, the community action agencies' powers are limited to borrowing money, applying for loans and grants, issuing indebtedness, and doing other things necessary to accomplish this statutorily permitted

that the Lexington-Fayette County Urban Government became the "adoptive" parent of the Airport Board and the Airport Corporation, although they were originally incorporated by non-government actors. See *Comair*, 295 S.W.3d at 100.

purpose. KRS 273.430. Once designated, a Kentucky community action agency has no power or authority to do any of these acts for any purpose other than to alleviate poverty within the area for which it is designated. Although the agency is not limited by the community block grant to the extent that it can accept other money, it is strictly limited to its singular statutory purpose of alleviating poverty in its designated area. Thus, once designated, a community action agency exists only for the purpose of serving the counties that designate it.

The Court of Appeals' decision similarly misinterprets the transformative nature of designation as a community action agency when it seeks to distinguish Kentucky River from the University of Louisville, which was originally organized as a private organization but became immune when it was designated by statute as a public university. *Louisville v. Martin*, 574 S.W.2d 676 (Ky. 1978). According to the Court of Appeals, the University of Louisville's designation as a public university changed its fundamental nature because it required the University of Louisville to change its articles of incorporation to conform to state law, it was required to surrender itself to state control, its property was converted to the exclusive use of the Commonwealth, and that the Governor could appoint all board members. The Court of Appeals' majority asserts that this differs from Kentucky River's designation as a community action agency:

[Kentucky River's] designation as a community action agency did not require it to amend its articles of incorporation. The designation did not vest the Commonwealth with any interest in Kentucky River's real or personal property. While the designation involved some oversight and regulation by the Commonwealth, the Commonwealth did not take control of Kentucky River's day-to-day operations or have direct oversight in the administration of programs funded separate from the block grants. Furthermore, Kentucky River remained free to serve

other interests outside the scope of its designation as a community action agency. In all respects, Kentucky River continued to function as a private, nonprofit entity.

[Court of Appeals Decision, p. 21 – 22, App’x 2.] Again, the majority’s analysis below understates the impact of the community action agency designation and gives undue weight to Kentucky River’s original corporate structure. Once designated as a community action agency, Kentucky River lost the ability to select its own Board of Directors, and instead had to cede complete control to its designating counties and their impoverished electorate. It did not remain free to pursue interests outside of its designation, because KRS 273.410 mandates that it exists for the sole purpose of “alleviating poverty” within the area for which it is designated. And the counties’ control and the state’s oversight is not limited in any manner to programs funded by the block grants, as KRS 65.060, 065, and 070, and KRS 273.405, 410, 415, 430, and 439 do not make any distinction between activities funded by block grants and activities funded in any other manner.

Most significantly, Kentucky River’s designation as a community action agency was a one way street – once it accepted being designated as a community action agency it lost any authority to determine otherwise. While a private nonprofit retains the power to cease its corporate activities and return to its corporate franchise, a designated community action agency has no such power. *Compare* KRS 273.171 *with* KRS 273.430. When Kentucky River accepted designation as a community action agency it irrevocably subjected itself to the control and oversight of its designating counties and the state until the counties and the state decide otherwise. The Court of Appeals notes that “if [Kentucky River’s] designation ceased tomorrow, it could carry on as a private nonprofit,” but that could only occur through state, county legislative and executive actions.

Thus, once designated, Kentucky River stands on the same footing as the Airport Corporation, SLF and the University of Louisville. Each entity exists for a solitary purpose set by the state or county. Each entity is subject to county and/or state control and oversight. And each entity could theoretically carry forward privately if the state or the urban-county government severed their government ties, but none has the option of severing these ties on their own.

Regardless of how it was originally formed, Kentucky River became a state district and county agency when it irrevocably accepted designation as Clark County's community action agency. Much like the Lexington-Fayette County Urban Government became the "adoptive" parent of the Airport Board in *Comair*, the county governments became the "adoptive" parents of Kentucky River after they designated it as their community action agency. See *Comair*, 295 S.W.3d at 100. Kentucky River is now required to exclusively serve Clark County and the others that have since designated it (Madison, Estill and Powell Counties), and is subject to those counties' and the state's direct oversight and control. The Court of Appeals' focus on Kentucky River's original creation improperly ignores the reality of its present existence. Accordingly, this Court should reverse the findings of the Court of Appeals and clarify that immunity is determined by what the entity is and what it does, not what it once was.

2. Kentucky River is not asserting that it is entitled to sovereign immunity because it received state funds.

As a corollary to its argument that Kentucky River was not a public agency controlled by the counties that designated it, the Appellees attempted below to mischaracterize Kentucky River's argument as asserting that Kentucky River was entitled to immunity because it received public funds. Kentucky River's argument before this

Court is substantively the same as the argument asserted in the trial court and Court of Appeals below, so it is likely the same tactic will be attempted here. Essentially, the Appellees created a straw man by asserting that: “Defendant claims, because it receives tax dollars, as a ‘community action agency’ that it cannot be held liable for its negligence.” [Record, Volume 4, Plaintiffs’ Response to Defendant’s Motion for Summary Judgment on Sovereign Immunity, pp.531-39.] The Appellees then shoot down their straw man repeatedly, asserting:

- “Sovereign immunity does not come along with (or just by virtue of) the receipt of funds, as Defendant would like to argue.” [Record, Volume 4, Plaintiffs’ Response to Defendant’s Motion for Summary Judgment on Sovereign Immunity, pp. 531-39.]
- “If Defendant were correct, and sovereign immunity extended to any entity that received taxpayer dollars, the expansion of the doctrine would be limitless. Road contractors, nursing homes, land developers, and office supply stores (to name just a few) would not be liable for their negligence just because they were a state vendor.” [Record, Volume 4, Plaintiffs’ Response to Defendant’s Motion for Summary Judgment on Sovereign Immunity, pp. 531-39.]
- “Defendant’s status as a recipient of taxpayer dollars designated for community action agencies does not afford it immunity because the receipt of that money does not make the state the Defendant’s parent entity.” [Record, Volume 4, Plaintiffs’ Response to Defendant’s Motion for Summary Judgment on Sovereign Immunity, pp. 531-39.]

Kentucky River, however, is not asserting that sovereign immunity comes along with (or just by virtue of) the receipt of taxpayer dollars, that sovereign immunity should be extended to any entity that receives taxpayer dollars, or that its status as a recipient of taxpayer dollars entitles it to sovereign immunity. The only reference to Kentucky River’s funding in this Brief is an explanation in the statement of facts that as the Community Action Agency for Clark County, Estill County, Madison County, and Powell County, Kentucky River “receives these counties’ share of the annual federal

Community Services Block Grant that is distributed through the Kentucky Cabinet for Health and Family Services.” Kentucky River is not arguing, however, that its receipt of this Block Grant is the reason it is entitled to sovereign immunity, or that this makes it a public agency. In fact, it is the converse that is true – Kentucky River receives these counties’ Federal Block Grant funds because Kentucky River is the public agency designated by these counties to receive them. But this still does not address immunity.

So as to pre-empt any further confusion, Kentucky River’s immunity argument is as follows: Kentucky River is entitled to sovereign immunity because it is a public agency designated by county governments to perform a function – combating poverty – that has long been recognized in Kentucky as a state function performed by county governments. Kentucky River is a county, rather than a municipal, agency under the *Comair* analysis because it was designated by, and is controlled by, county governments. As a community action agency, Kentucky River is governed by county officials and democratically elected county representatives. It exists for the sole purpose of carrying out its state mandated function of combating poverty, and by state law it must operate in accordance with the Interlocal Cooperation Act for public agencies. It provides a variety of government services for the counties it serves, all of which fall within the government function of combating poverty. For these reasons, Kentucky River is a public agency entitled to sovereign immunity.

B. Kentucky River operates for the exclusive function of providing for the poor, which has been recognized for more than a century as an essential state function performed by county governments.

It is undisputed that Kentucky River exists for the purpose of providing for the poor. This prong of the *Comair* analysis was accepted by both the trial court and the Court of Appeals below, the latter of which stated in its Opinion, “[w]e agree with

Kentucky River that providing services to the poor at the county level has historically been treated as an integral government function.” [Court of Appeals Opinion, p. 16, App’x 2.] Kentucky law mandates as much, defining a community action agency as “a corporation organized *for the purpose of alleviating poverty* within a community or area by developing employment opportunities, by bettering the conditions under which people live, learn, and work; and by conducting, administering and coordinating similar programs.” KRS 273.410 (emphasis added). This purpose is also reflected in Kentucky River’s Amended Articles of Organization, which state that Kentucky River exists exclusively:

“...for the benefit of the people of the Commonwealth of Kentucky, including, but not limited to the provision of early childhood education for poor and handicapped children, housing for low and moderate income families, economic development, job training, and social services to benefit disadvantaged persons.”

[Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, Articles of Amendment attached as Exhibit 2 to Motion, p. 521.]

The activities of Kentucky River mirror the statutory mandate and Kentucky River’s stated purpose. It is undisputed that Kentucky River’s programs include: Head Start and Early Head Start programs; emergency food, shelter, and energy assistance programs providing rent, mortgage, and utility credits and assistance; homelessness and housing assistance programs providing housing assistance, transitional housing, rent assistance, substance abuse recovery, housing vouchers, home repair, and subsidized housing; public transportation services in Madison and Clark County; a health care clinic for uninsured and underinsured homeless persons in Estill County and Powell County; senior citizens centers in Berea, Winchester, Richmond, and Stanton; and operation of the

Liberty Place Recovery Center for Women at issue in this action, which is one of ten Recovery Kentucky substance abuse recovery centers in the state created by governor Fletcher for the purpose of combatting homelessness resulting from substance abuse. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, Affidavit of Jozefowicz attached as Exhibit 1, pp. 518-20, attached hereto as Appendix Tab No. 3.]

Providing for the poor has been recognized for more than a century as an essential function of the state traditionally performed by counties. *Marion County v. Rives & McChord*, 118 S.W. 309, 311 (1909). There, while addressing the distinctions between local function performed by municipal corporations and state functions performed by counties, Kentucky's highest court held:

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, *of provisions for the poor*, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.

Id. (emphasis added). This passage from *Rives & McChord* was quoted in its entirety by the Kentucky Supreme Court in *Comair*, and *Rives & McChord*'s listing of traditional state functions performed by counties was specifically relied upon for its conclusion that the Airport Board and Airport Corporation were entitled to immunity. *Comair, Inc.* 295 S.W.3d at 100. Indeed, the *Comair* Court quoted the decision twice, explaining the second time that:

Of particular interest here is that functions carried out by the county are usually state functions and that "the policy

of the state at large ... in the means of travel and transport” is, or at least can be, a county (and state) concern, rather than a municipal concern.

It is with this latter statement that the nature of the Airport Board and Airport Corporation in this case become clear.

Id. (quoting *Rives and McChord*).

Comair expressly adopts *Rives & McChord*’s analysis of state verses municipal functions, quoting it twice and directly relying upon it for its conclusion that transportation services are a state function. *Rives & McChord* specifically holds that state functions also include “matters ... of provision for the poor,” and that these are matters that are almost exclusively performed at the local level by county governments. Thus, this is exactly the type of function meant by the *Comair* Court when it described functions integral to state government as those “state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties).” *Comair, Inc.* at 99. As there can be no dispute that Kentucky River’s sole function is to provide for the poor, Kentucky River meets the most important inquiry of the *Comair* analysis.

C. Kentucky River is entitled to immunity.

Kentucky River is a statutorily recognized district of the Commonwealth, and a quasi-governmental agency mandated by, and established pursuant to state law. It exists for the purpose of serving an essential function of state government – providing for the poor – with the political subdivisions that designated it. It was originally designated by Clark County in 1968, and now serves Clark County, Estill County, Powell County, and Madison County. These Counties and their residents primarily control its governance pursuant to state statute, although it is also controlled and governed by the

Commonwealth. Accordingly, Kentucky River meets all the definitions of the “in-between entity” entitled to sovereign immunity under the *Comair* analysis.

CONCLUSION

For the foregoing reasons, Kentucky River respectfully requests that this Court reverse the Opinions of the Kentucky Court of Appeals and the Madison Circuit Court, and that judgment be entered in favor of Kentucky River on the grounds of sovereign immunity.

Respectfully submitted,



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